Supreme Court of the United States

OCTOBER TERM 1930

No. 983

ARIZONA GROCERY COMPANY, A CORPORATION,
Petitioner,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, A CORPORATION, BAY TRANSPORT COMPANY, A CORPORATION, AND SOUTHERN PACIFIC COMPANY, A CORPORATION,
Respondents,

AND

ARIZONA GROCERY COMPANY, A CORPORATION,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, A CORPORATION, AND SANTA MARIA VALLEY RAILROAD COMPANY, A CORPORATION,
Respondents.

APPLICATION BY PETITIONER FOR LEAVE TO FILE SUPPLEMENTAL BRIEF, WITH APPENDIX, IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI.

Comes now the Arizona Grocery Company, petitioner, and respectfully requests leave of the court to file a supplemental brief in support of its Petition for Writ of Certiorari, heretofore filed herein. Since the filing of the Petition for Writ of Certiorari and brief in support thereof,

an opinion and decision of the Circuit Court of Appeals for the Fifth Circuit was rendered on the 21st day of July, 1931, in a case entitled *Eagle Cotton Oil Company, a corporation, vs. Southern Railway Company, et al.* (not yet reported; for full copy of opinion see appendix herein), in which there is a concurring opinion, written by Judge Hutcheson, directly opposed to and in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in the present case.

DATED this 24th day of August, 1931.

SAMUEL WHITE,
Counsel for Petitioner,

FRED J. ELLIOTT,
FRANK L. SNELL, JR.,
Of Counsel.

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Respondents.

SUPPLEMENTAL BRIEF BY PETITIONER IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI.

In the opinion and decision of the Circuit Court of Appeals for the Ninth Circuit in the present action, a decision of the United States District Court for the Southern District of Mississippi in an action entitled *Eagle Cotton Oil Company vs. Southern Railway Company, et al.* (46 F. (2d) 1006) was cited as an authority sustaining the

conclusions reached by the court in holding the order of the Interstate Commerce Commission invalid, and therefore refusing reparation to your petitioner (R. 456). This decision of the United States District Court for the Southern District of Mississippi was appealed, and since the filing of the Petition for Writ of Certiorari herein by your petitioner, the Circuit Court of Appeals for the Fifth Circuit on July 21, 1931, rendered its decision and opinion, reversing that of the District Court. The District Court had held an order of the Interstate Commerce Commission allowing reparation to a shipper to be void. The Circuit Court of Appeals for the Fifth Circuit held this order to be valid, and that the shipper was entitled to reparation in accordance with the order of the Interstate Commerce Commission. This opinion sets forth clearly the facts and questions involved, a full copy of the opinion being included in the appendix to this brief. It will be noted that the concurring decision and opinion of Judge Hutcheson in this case is directly opposed to and in conflict with the decision and opinion of the Circuit Court of Appeals for the Ninth Circuit in the present case.

Your petitioner therefore urges, as an additional ground for the granting of its Petition for Writ of Certiorari, heretofore filed herein, this conflict in the opinion of Judge Hutcheson of the Circuit Court of Appeals for the Fifth Circuit in the *Eagle Cotton Oil Company vs. Southern Railway Company* case (set forth in appendix herein) and the decision and opinion of the Circuit Court of Appeals for the Ninth Circuit in the present case (R. 438-462).

This conflict, together with the other grounds urged in the petition heretofore filed herein, your petitioner be-

lieves calls for the exercise by this Honorable Court of its supervisory powers and that to such an end a writ of certiorari should be granted herein, in order that this question may be determined and settled so that the Interstate Commerce Commission, shippers and carriers may know their rights.

Respectfully submitted,

SAMUEL WHITE,
Counsel for Petitioner.

FRED J. ELLIOTT,
FRANK L. SNELL, JR.,
Of Counsel.

APPENDIX

IN THE

Supreme Court of the United States

FOR THE

FIFTH CIRCUIT

No. 6126

EAGLE COTTON OIL COMPANY, a Corporation,

Appellant,

Versus

SOUTHERN RAILWAY COMPANY, ET AL.,

Appellees.

Appeal From the District Court of the United States for the Southern District of Mississippi.

E. B. WILLIAMS, LUTHER M. WALTER, JOHN S. BURCHMORE, NUEL D. BELNAP, ALLAN P. MATTHEW, (FELIX T. SMITH, SAMUEL L. WRIGHT, PAUL M. GREGG, JERRY H. POWELL, F. F. THOMAS, JR., JOHN O. MORAN; PILLSBURY, MADISON & SUTRO; McCUTCHEN, ONLEY, MANNON & GREENE, on the Brief) for Appellant. (As Amicus Curiae).

JOSEPH P. COOK, A. S. BOZEMAN, W. N. McGEHEE, W. E. BASKIN, JAMES E. LYONS, BURTON MASON, HARRY McCALL, (Baskin, Wilbourn & Miller; Bozeman & Cameron, on the Brief) for Appellees. (As Amicus Curiae).

Before BRYAN, FOSTER and HUTCHESON, *Circuit Judges.*

BRYAN, *Circuit Judge.*

This is an action by appellant on an order of the Interstate Commerce Commission awarding reparation on account of excessive freight rates collected by the appellee railroad carriers for the transportation of coal from mines in Alabama to Meridian, Mississippi. The published rate of $2.03 per ton was held by the Commission, in a proceeding begun before it by appellant in 1925, to have been excessive to the extent that it exceeded $1.85 per ton from certain mines and $1.95 from other mines, and these lower rates were prescribed as reasonable for the future. Appellant was awarded reparation measured by the difference between the lower and higher rates on shipments received within two years prior to the filing of its claim up to March 8, 1928, the date of the order. Eagle Cotton Oil Co. v. Southern Railway Co., 140 I. C. C. 131. No attack is made upon the reasonableness of the new rates as applied to the period covered by the reparation award. But the district judge, before whom the case was tried without a jury pursuant to written stipulation, held that the Commission was without power to award reparation on account of shipments made prior to the date of the order finding the $2.03 rate to be unreasonable, because that rate had been fixed and prescribed by it, and, this being so, must be conclusively presumed to have been a reasonable and lawful one. He therefore entered judgment denying appellant's claim for damages. 46 F. (2) 1006.

On July 22, 1915, the Commission in passing upon a proposed increase of rates on coal, authorized a rate not

exceeding $1.20 per ton from the Alabama mines to Meridian. Coal and Coke Rates for the Southeast, 35 I. C. C. 187, 202. An increase of 10c per ton, effective July 1, 1917, was authorized in the Fifteen Per Cent Case, 45 I. C. C. 303. On June 25, 1918, another general increase, but without reference to any particular rate, was made by the Director General, and thereupon appellees published a rate on coal of $1.80 per ton; but this was done without the order or approval of the Commission. On August 26, 1920, the Commission authorized a general increase of 25 per cent of freight rates, but without approval of any particular rate, Ex Parte 74, 58 I. C. C. 220; and appellees raised the rate here involved to $2.25 per ton. On July 1, 1922, the Commission recommended a general reduction of 10 per cent also without approval of any particular rate, Reduced Rates, 1922, 68 I. C. C. 676; and appellees thereupon reduced the rate in question to $2.03 per ton, which they continued to collect up to March 9, 1928, when the $1.85 and $1.95 rates were established by the Commission as maximum rates from the Alabama mines to Meridian. Eagle Cotton Oil Co. v. Southern Railway Co. et al., supra.

These several decisions of the Commission and the order of the Director General are relied on to establish the conclusion that the $2.03 rate was fixed and prescribed by the Commission as a reasonable and lawful maximum rate. The rate of $1.20 per ton on shipments of coal from the Alabama mines to Meridian was the only one that was definitely and specifically authorized by order of the Commission. That rate became effective on October 1, 1915, and, as the law then was, expired by limitation at the end of two years. Compiled Statutes § 8583. It was not until after the passage of the Trans-

portation Act of 1920 that a rate established by the Commission could continue in force without time limit until its further order." 49 U. S. C. A. 15 (2). The Commission's order in the Fifteen Per Cent Case, supra, effective July 1, 1917, authorized a general increase of 10c per ton throughout the country, but did not purport to grant permission to advance any particular rate. The order of the Director General in 1918 likewise was dealing with all rates, and had no particular reference to rates on coal; besides it was not the equivalent of an order of the Commission, and the Commission by § 10 of the Federal Control Act, 40 Fed. Stat. 456, was given the power to suspend or set it aside. But with the aid of the Director General's order the rate did not exceed $1.80 per ton, which was less than the rates approved by the Commission upon the basis of which it awarded reparation to appellant. The carriers rely on Ex Parte 74, supra, which authorized an increase of 25 per cent in the general level of all rates, but without approval of any particular rate, as their authority for increasing the rate on coal shipped from the Alabama mines to Meridian to $2.25 per ton; and then claim that the rate became $2.03 per ton in 1922 as a result of the Commission's decision in Reduced Rates, 1922, supra. The most that can reasonably be contended for in support of the proposition adopted by the trial court that the $2.03 rate was Commission-made is that it resulted from adding to and building up the rate of $1.20 that was authorized by the Commission. Aside from the fact that the Commission's order entered in 1915, establishing the $1.20 rate, had expired by limitation long prior to the decisions in Ex Parte 74 and in Reduced Rates, 1922, the law, as we understand it, is that orders of the Commission authorizing a general upward revision or adjustment of rates are not to be construed as

giving approval of or prescribing particular rates. In Brimstone R. R. Co. v. United States, 276 U. S. 104, at page 122, the Supreme Court said: "The general findings and permission of Ex Parte 74 and Matter of Reduced Rates did not approve or fix any particular rate. . . . . In them the Commission was dealing with the whole body of rates throughout the country—was looking at the general level of all rates and the propriety of the rates to which the Brimstone Company was party was not the subject of particular investigation or consideration." It is true that case was dealing with a division of rates, but the principle involved is the same here as it was there. The Supreme Court in that case cited with approval, among other decisions of the Commission, Steel & Tube Co. v. Director General, 61 I. C. C. 526, in which the Commission said that its "sanction of a general adjustment does not carry with it the approval of any particular rate." We are of opinion, therefore, that the trial court erred in holding that the $2.03 rate collected from appellant by appellees had been fixed and prescribed by the Commission, and in entering judgment rejecting appellant's claim for reparation. Having reached this conclusion it is not necessary in this case to decide, and we do not decide, whether or not the power of the Commission to award reparation extends to rates of its own making. The decision of the Circuit Court of Appeals for the Ninth Circuit in Atchison, Topeka & Santa Fe R. R. Co. et al., v. Arizona Grocery Co., ... F. (2), [not yet officially reported] to the effect that the Commission was without jurisdiction to award reparation, proceeded on the theory that the rates there involved were Commission-made. The rate here involved in our opinion was made by the carriers, and if it was, of course, the Commission,

upon a valid finding that it was excessive, had the power to award reparation. 49 U. S. C. A. § 9.

The judgment is reversed, and the cause remanded for further proceeding not inconsistent with this opinion.

(ORIGINAL FILED JULY 21st, 1931.)

No. 6126 EAGLE COTTON OIL CO. vs. SOUTHERN RY. CO. HUTCHESON, *Circuit Judge*, Concurring:

I concur in the judgment of reversal. I think it plain that the rate made the subject of the reparation order was not one which had been specifically promulgated by the Commission. I think it equally plain that speaking generally, the rate had received the Commission's approval and sanction.

I understand appellee to contend that in either event reparation could not have been ordered.

In my opinion neither specific approval by the Commission of a general schedule of rates, nor the specific promulgation of a particular rate, prevents the Commission from granting reparation as to that rate, if upon complaint, it is advised that reparation should be made.

I place my concurrence on the broad ground, therefore, that it is immaterial whether the rate made the subject of the reparation order was, as the trial court held, commission-made, or as the Court of Appeals holds, carrier-made. If a shipper has been injured by it, the Commission, and the Commission alone, may order reparation.

By the Transportation Act Congress has placed squarely upon the carriers the burden of establishing and main-

taining just and reasonable rates, has made the carriers responsible in damages to any person injured by their failure so to do so, and has directed the Commission to hear the shipper's complaint and if well founded, to award damages thereon.

By a long line of decisions built upon T. & P. Ry. Co. vs. Abilene, 204 U. S. 426, the character of the Interstate Commerce Commission, its functions as a "tribunal informed by experience" to decide rate questions between carrier and shipper, the limits, the extent of its powers, the sphere within which and the method by which it may and must operate have been carefully worked out and set down.

In addition, the Interstate Commerce Commission has through a long course of practice and in a series of decisions of its own, built up and established for itself with the sanction and approval of the courts, a character of flexibility in the matter of the approach to, the consideration and determination of, rates and practices, and the results flowing therefrom in which the principle of res adjudicata or estoppel by decision has had and can have no just place.

It must of course be conceded that Congress could have by enactment at any time changed this settled character of the Commission and converted it into a body not supervisory and regulatory of carrier rates as it now is, but one which like the state commissions shall in a rigid and final way, except for direct resort to the courts, fix and prescribe rates. I think it perfectly plain that it has never done so.

In view of the structure and history of the Act, the long continued operation under it, the uniform current of

opinion in the Commission and in the courts as to the dual function which permits the Commission prospectively to control the course of rates while preserving its power to retrospectively correct them and to award damages for injustices and injuries which have flowed from their establishment; in view of the fact that though the Act now invoked to deprive the Commission of this power of reexamination has long been in existence this is the first case in which such a holding has been sought, I think it plain that those who would maintain that Congress has changed the character of the Commission should be prepared to point to some clear enactment carrying that intention.

The invoked decisions of the state courts do not support the position of appellee here. They make strongly against it. They show that instead of the states having a ratemaking system like the federal one, not rigid, but flexible, which permits its Commission from time to time and at any time to make orders changing rates, correcting abuses, reforming conditions and awarding reparations, while in reliance upon the power of the Commission to retroactively repair injuries sustained as the result of their prospective orders, shippers may experimentally try out rates before resorting to the courts for relief, their systems are rigid and inflexible.

Under their systems their Commissions make their rates, and until set aside by the courts they are final and conclusive on carrier and shipper alike.

In the State of Texas, for example, the law requires not the carriers, but the Commission to establish reasonable rates. It provides for a review by the courts of any rate, classification order, etc.; adopted by the Commission

whether at suit of carrier or shipper, in which the unreasonableness or injustice not of the carrier's, but of the Commission's rates and practices may be brought into question. Unless upon a timely suit the rates are found unreasonable, they are by law made uncontrovertible as between carrier and shipper. M. K. & T. vs. R. R. Com. 3 S. W. (2d) 489; Producers vs. M. K. & T., 13 S. W. (2d) 679, while in Louisiana though the Commission has the right to award damages, the statute limits the damages which may be awarded to those resulting from "violations of rates, classifications, rules or orders adopted by the Commission." T. & P. vs. Louisiana, 69 So. 837.

The courts in both of these states, in fact in all of the states, decisions from which are cited by appellee, give full recognition to the difference in the character and structure of the jurisdiction exercised by the Interstate Commerce Commission and that exercised by their own Commissions.

In the opinion of the Circuit Court of Appeals in Atchison, Topeka & Santa Fe vs. Arizona Grocery Co. not yet reported holding that the Commission could not award reparation as to the rates specifically theretofore prescribed by it, it is said that under such circumstances "The shipper's remedy would be seasonable application for a change of rates before any serious damage had been suffered."

In my opinion this will not do. This is indeed the remedy, and the only remedy the shipper has under the state systems. This is, however, not the case under the federal system. There the remedy is simpler, more efficacious, more reasonable, more just to shipper and carrier alike, and more consonant with the experimental

character of rates and ratemaking. This system permits rates to be experimentally laid down and experimentally tried out. It preserves that flexibility of adaptation, the maintenance of which is necessary to the life and growth of our great and changing commerce, which would be lost and defeated if immediate resort to the courts were necessary, as in the state systems, to protect the rights of shippers against the burdens of an experimental rate.

This system, without fixation or rigidity, leaves it to the Commission to deal justly and fairly by carrier and shipper alike, authorizing it to at once use its powers to effect and maintain a reasonable rate structure through constant experiment and change, while preserving to it the right at any time upon complaint to relieve by specific reparation awards those who have suffered from the temporary inequalities and imperfections of this rate structure.

For the courts to now hold, in the absence of some specific and compelling Congressional command, that such a system, so flexible, so reasonable, so adapted and adaptable to the commerce of this nation, so long an integral part of its operations under the sanction of the courts, is not in accordance with the law, would be in my opinion unwise, unreasonable and wholly without legal warrant.

(ORIGINAL FILED JULY 21st, 1931.)